

South Africa

This information is taken from the GlobalSharePlans database and should be treated as regulatory and tax information only. We would strongly recommend getting the information signed off specifically for any individual share plan. The advice is also based on a situation where the local company is not charged the cost of the plan and does not contribute to the costs in any way.

SECURITIES LAWS

Are there any securities filings, registrations or government consents required for an offer of shares by a parent company to employees of its subsidiary in South Africa?

1. Where those shares are offered for consideration i.e. there is a price to pay for the shares

It is unclear whether or not public offer rules apply and local advice should be sought. If existing shares are used the risk is lower. Where they do apply an application for exemption must be made to the South African Registrar of Companies, and a prospectus issued. Following the enactment of the new Companies Act, it will be clear that the rules do not apply provided the Plan meets certain requirements. If existing shares are used it is less likely to be considered that public offer rules apply.

2. Where the shares are offered for free

It is unclear whether or not public offer rules apply and local advice should be sought. If existing shares are used the risk is lower. Where they do apply an application for exemption must be made to the South African Registrar of Companies, and a prospectus issued. Following the enactment of the new Companies Act, it will be clear that the rules do not apply provided the Plan meets certain requirements. If existing shares are used it is less likely to be considered that public offer rules apply.

3. Where only a cash based plan is offered

No, there are no securities law restrictions or registrations/filing required for an employee offer.

EXCHANGE CONTROLS

Are there any exchange control restrictions/notifications?

1. Where shares are offered for consideration i.e. there is a price to pay for the shares and therefore funds are remitted from South Africa to acquire the shares

It is recommended that the Plan should be placed on record with the South African Reserve bank ("SARB") by the employees or the local company on their behalf by power of attorney. Details lodged should include, plan rules, number of shares involved, market value of shares, method of payment and chargeback arrangements. Employees will need to obtain approval from SARB for any remittance of funds to acquire shares under the Plan. This approval is necessary even if the local employer meets the cost of the shares. Approval is granted on the basis that the cost of the shares is applied against the lifelong foreign investment allowance of ZAR 4,000,000. The employee will need to complete an application form and obtain a tax clearance certificate from the South African Revenue Services.

2. Where the shares are offered for free and therefore there will be no remittance from South Africa

It is recommended that the Plan should be placed on record with the South African Reserve bank ("SARB") by the employees or the local company on their behalf by power of attorney. Details lodged should include, plan rules, number of shares involved, market value of shares, method of payment and chargeback arrangements. No SARB approvals are needed but the employee must notify the SARB of any acquisition of foreign shares within 30 days of entitlement.

3. Where the employee receives a cash transfer into South Africa under a cash based plan

It is recommended that the Plan should be placed on record with the South African Reserve bank ("SARB") by the

employees or the local company on their behalf by power of attorney. Details lodged should include plan rules, numbers of shares involved, market value of shares, method of payment and chargeback arrangements. Employees must remit cash receipts to South Africa within 30 days of entitlement and must complete a Balance of Payment Form through an Authorised Dealer.

Not applicable.

DOCUMENTATION

Is there a legal requirement to provide employees with a copy of the Plan rules?

There is no legal requirement to provide participants with a copy of the Plan rules. However, participants should be provided with a copy of the Plan rules to avoid misinterpretation of any particular restriction of their rights under the Plan rules.

Is there a legal requirement to translate the Plan rules or related documents into the local language?

There is no legal requirement to give the participants a translated version of the Plan rules or related documents. Although, if there is any doubt as to whether all the participants understand the rules, it is recommended the participants be provided with a translation of the rules.

Are there any issues with the use of electronic communications?

There are no issues with electronic communications and no additional legal requirements are raised. All information relating to the Plan can be provided electronically to participants. The legal, securities and other advice in this report applies equally to communications made electronically as to written (hard copy) communications. It is however advisable to make all information available in hard copy at a designated place and to send it in hard copy to employees on request.

SALARY DEDUCTIONS

Under an option plan or a share purchase plan where employees can sometimes be given the option to save towards the exercise or purchase price, can the local company make deductions from the employees' after tax salary to make contributions under the Plan?

The local company can make deductions from the participants salary in order to contribute to the Plan. These must be agreed to in writing by the participant and payroll deductions can only be carried out by the employer.

EMPLOYEE CONSULTATION

Are there any obligations to consult or inform any works councils or similar bodies before introducing the Plan?

The local company should consult with any employee works councils before implementing the Plan.

EXCLUSION WORDING ACQUIRED RIGHTS

Are there any requirements to prevent the Plan being incorporated into the employee's employment contract?

While there is an acquired rights risk that benefits under the Plan may be included as a permanent part of the employment contract (for example being recovered in an unfair dismissal claim), a specifically drafted exclusion clause is likely to protect the parent company from any claims on severance of employment.

DATA PROTECTION REGISTRATION

Will the operation of the Plan require the Company to make a specific data protection filing or registration?

There is no requirement to make a specific data protection filing for the Plan.

GOVERNING LAW CLAUSE

Will a provision stating that there is a specific governing law be effective in South Africa?

Even where there is a choice of law clause in the Plan rules, the local courts are still likely to accept inherent jurisdiction over the Plan.

USE OF TRUSTS

Does the use of trusts affect the advice given above?

The use of a trust does not generally affect the advice given above, however if it is intended to use a trust in connection with the Plan it is always advisable to seek confirmation that this is the case.

TREASURY SHARES

Does the use of treasury shares rather than newly issued shares affect the advice given above?

It is less likely that public offer rules will be considered to apply if treasury shares are used.

INCOME TAX PAYABLE

Option Plan

There is no tax on grant.

There is no tax when the options become exercisable.

Income tax is payable on exercise, on the difference between the market value of the shares and the option price.

The maximum rate applicable is 40%.

Share Purchase Plan

There is no tax on award.

Income tax is payable on purchase on the difference between the fair market value of the shares and the purchase price.

The maximum rate applicable is 40%.

Restricted Stock Plan

There is no tax on award.

Income tax is payable on the value of the shares on vesting.

The maximum rate applicable is 40%.

Restricted Stock Unit Plan

There is no tax on award.

Income tax is payable on the value of the shares on vesting.

The maximum rate applicable is 40%.

Cash Plan

There is no tax on award.

On receipt income tax is assessed on the cash payment.

The maximum rate applicable is 40%.

TAX ON SALE OF SHARES

Any chargeable gain made on the sale of shares is taxed at rates up to 10%.

If the sale of shares is considered a revenue transaction tax will be income tax at 40%.

WITHHOLDING OBLIGATION

Option Plan

Withholding is required by law.

Share Purchase Plan

Withholding is required by law.

Restricted Stock Plan

Withholding is required by law.

Restricted Stock Unit Plan

Withholding is required by law.

Cash Plan

Withholding is required by law.

SOCIAL SECURITY

Employee

None.

Local Company

None.

RECHARGE SECTION

If the local company is recharged any costs relating to the plan, the local company can normally claim a deduction for:

- Any costs of administering the Plan.
- The cost of the benefit (in shares, discounts or cash) given to the employees.
- Any reasonable costs connected with the Plan.

A recharge of the costs of the Plan to the local company makes no difference to the tax treatment as set out above.

If there is a recharge of costs to the local company this can have major exchange control implications. Reserve Bank of South Africa approval will be required before transfers can be made

This information was last updated on May 14, 2010.